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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

73-29

CORNING GLASS WORKS, a Corporation,
Petitioner,

vs.

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI *

INTEREST OF THE CHAMBER

The Chamber of Commerce of the United States is a federation consisting of membership of over thirty-seven hundred (3,700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of thirty-eight thousand (38,000), and an underlying membership of approximately five mil-

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* Pursuant to Rule 42(2) of the Rules of this Court, the written consents of the parties to this case have been obtained and will be lodged with the Clerk of the Court.

lion (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' views on questions of importance to their vital interests and to render such assistance as it can to courts' deliberations in such areas, the Chamber has frequently participated in *amicus curiae* in a wide range of significant labor relations matters before this Court. *E.g.*, *N.L.R.B.* v. *The Boeing Company, et al.*, —— U.S. ——, 93 S. Ct. 1952 (1972); *N.L.R.B.* v. *International Van Lines*, 409 U.S. 48 (1972); *N.L.R.B.* v. *Granite State Joint Board*, 409 U.S. 213 (1972); *N.L.R.B.* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971); *Boy's Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *N.L.R.B.* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972); *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970); *Sears, Roebuck and Co.* v. *Carpet Layers, Local 419*, 397 U.S. 655 (1970); and *Los Angeles Herald Examiner* v. *Kennedy*, 400 U.S. 3 (1970).

The instant proceeding is of particular concern to the Chamber's members, as well as to employers generally. Certain of the relevant facts found by the court below provide an ideal basis for consideration of significant issues of national importance relevant to interpretation of the Act.

Prior to June 1, 1966, Corning paid employees working as night shift inspectors at a higher rate than it paid day shift inspectors, and only men worked as night shift inspectors. After June 1, 1966, although the pay rate differential was maintained, the two jobs became equally available to employees of each sex and sexual integration of the jobs was substantially obtained. Effective January 20, 1969, as a direct result of collective bargaining negotiations, the pay rate on the two jobs was equalized

at a new rate higher than the rate previously existing for either job and an additional wage rate premium, based solely upon seniority (a "red circle" rate), was granted to every person employed on or prior to the date of the Agreement, male or female, who at any time thereafter worked as a night shift inspector. Thus, in addition to the threshhold question of whether the two jobs are "equal" within the meaning of the Equal Pay Act of 1963, the questions presented are (1) whether an employer violates the Act by paying dissimilar wages in jobs being compared where the employment opportunities in those jobs are available equally to both sexes and the employer is not paying a wage rate differential in violation of the Act within each of the jobs being compared, notwithstanding a finding of prior violative conduct, and (2) whether the granting of an increased rate of pay based exclusively upon seniority, to all employees of each sex on a given job, is a violation of the Act, even if there has been a finding of prior discriminatory practice.

These issues are of practical significance to the Chamber and its members in that the imposition of liability based solely upon a past practice which is no longer operative or effective discourages voluntary compliance, is at variance with both the philosophical percepts and the literal reach of the Act, and results in unwarranted imposition upon an employer whose current practices are in accord with the mandate of the Act.

REASONS FOR GRANTING THE WRIT

I. This Court Has Never Considered The Manner By Which Compliance With The Equal Pay Provisions Of The Fair Labor Standards Act Can Be Achieved

Resolution of the question of what methods of statutory compliance are available under the equal pay provisions of the Fair Labor Standards Act is of paramount importance to employers generally. The scope of the statutory

mandate reaches nearly every employer and directly affects various aspects of the employers' cost of doing business and methods of operation as well as his relations with his employees and any unions representing those employees.

Imposition of the remedy compelled by the court below[1] necessarily disruptively affects each of these aspects of the employers' operations. Consideration by this court of both the bases of the holding below as well as the conclusion reached that the only method of statutory compliance available is equalizing the rates of pay at the higher rate is essential to provide the necessary guidelines required by the business community.

Although the court below rejected Corning's contention that its methods of operation and compensation comported with the statutory mandate, the court acknowledged that ". . . the issues are not free from doubt . . .". Only consideration by this court can finally resolve those issues, clarify that "doubt", and settle important questions of federal policy embedded in an Act of Congress.

II. The Court Below Erroneously Decided Substantial Issues Having A Widespread Applicability

A. *Notwithstanding a finding of prior violative conduct, dissimilar wage rates applied non-discriminatorily between the sexes should not result in a violation of the Act.*

The proscription of the Act attaches only to employer discrimination between employees on the basis of sex when an employer is paying wages to employees at a rate less than the rate at which such employer pays wages to employees of the opposite sex where the work on the jobs being compared is equal by virtue of requiring equal skill, effort and responsibility. (Section 6(d)(1) of the Fair

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[1] *Hodgson* v. *Corning Glass Works*, 474 F.2d 226.

Labor Standards Act of 1938 as added by the Equal Pay Act of 1963, 77 Stat. 56 USC Section 201(d)(1)).[2] The specific statutory language thus confines violative conduct only to instances where the practice complained of is a sexually based discrimination.

Corning contended that its action in making the night-shift inspector's job available on a non-discriminatory basis to employees of both sexes on June 1, 1966 and at all times thereafter eliminated a statutory basis for the finding of a violation. This was rejected by the court below principally in reliance upon that court's reading of certain legislative history. Such reliance is misplaced when it is used to alter the clear meaning of the language specifically set forth in a statute.[3]

Even if this were not the case, the legislative history relied upon does not support the conclusion reached. That history only sought to explain the so-called "reduction proviso" of the Act which precludes an employer from reducing the wage rate of any employee to obtain com-

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[2] The Act provides:

"(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees *on the basis of sex* by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; of (iv) a differential based on any other factor other than sex: Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." (emphasis added)

[3] *U. S.* v. *Oregon*, 366 U.S. 643, 649; *U. S.* v. *Missouri Pacific R. Co.*, 278 U.S. 269, 278.

pliance with the Act. The action instituted by Corning on June 1, 1966 did not fall within the ambit of the language relied upon by the court because that action did not operate to reduce the wages of any employee in order to comply with the provision of the Act, but rather was a successful affirmative effort to make the better paying night shift inspector job equally available on a non-discriminatory basis to employees of each sex. Moreover, the legislative history relied upon below, while confining itself to the remedial consequences of a breach of the "reduction proviso" failed to consider specific legislative history corroborative of the position asserted herein. As example, Congressman Frelinghuysen pointed out that "Nothing in this bill prohibits discrimination in pay strictly between women or strictly between men. *Discrimination that operates against both men and women is not prohibited.* The only thing prohibited is a difference in pay that is based on sex" (emphasis added). 109 Cong. Rec. 9196 (1963). Congressman Goodell, speaking to the issue directly involved here, stated, "Differences in pay between groups or categories of employees that contain both men and women within the category are not covered by this act." 109 Cong. Rec. 9196 (1963). Finally, in this regard, it is the *bona fides* of the Corning program of sexual job integration which specifically distinguishes the instant proceeding from *Schultz* v. *American Can Co.—Dixie Products*,[4] the case principally relied upon below, and other decisions to that effect.[5]

Implicitly, the courts' rejection of Corning's thesis was also based upon the assumption that a specifically eliminated, non-currently operative past practice is a sufficient basis in law upon which to predicate the finding of a present violation of the Act. Under such a construction,

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[4] 424 F.2d 356.

[5] See, e.g., *Hodgson* v. *Square D Co.*, 459 F.2d 805 (6th Cir.) *cert. denied*, 409 U.S. 967 (1972).

current compliance with the literal mandate of the Act could never be attained by sexual job integration if the rates of pay on the compared jobs were not also equalized. Thus, the anomolous situation arises where an employer, such as Corning, who is deemed to have violated the Act, cannot come into compliance by taking the very same action as would place an employer with no history of violation in a posture of complete compliance. If, for example, Corning had first gone into business on June 1, 1966 and had operated in exactly the same fashion which Corning here did operate from that day forward, no finding of violation would be possible because even if there were a finding that there was an unjustified discrimination between the rates of pay paid to the night shift and day shift inspectors, that discrimination could not be found to be sexually based since each job was sexually integrated. Such a wage disparity would simply not fall within the ambit of the Act's proscription.

B. ***The granting of an increased rate of pay based solely upon seniority to all employees of each sex employed in a given job should not be considered a violation of the Act even where there has been a finding of prior discriminatory practice.***

Effective January 20, 1969, and as the direct result of collective bargaining negotiations between Corning and the Union representing the employees here affected, the existing wage rate differential between day shift and night shift inspectors was abolished. A new wage rate, higher than either of the former rates, was established. Additionally, the collective bargaining agreement provided that any employee who was employed prior to that date would receive additional compensation when working as night shift inspectors. This additional compensation, or "red circle" rate, was found to contravene the provisions of the Act because, in the view of the court below, it

perpetuated prior violative conduct.[6] Essential to this conclusion is a disregard of the fact that the sole eligibility criteria necessary for the attainment of the "red circle" rate was the seniority of any employee working as a night shift inspector. The sex of any otherwise eligible employee has no impact upon whether or not such employee is paid the "red circle" rate. In the instant context, where night shift inspectors work is equally available to members of each sex and any employee in the plant, regardless of sex, is paid the "red circle" rate if such employee has the necessary seniority, neither an overt nor an insidious sexual discrimination is properly inferrable. Since "seniority" is a statutorily specified permissive basis for a wage rate differential, the effect of permitting a judicial holding predicated upon such an inference would be to eliminate this specific statutory defense in all instances where an employer at some prior time had engaged in violative conduct. Such a result is not justified either under the literal wording of the Act or any reasonable reading of the legislative history.

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[6] 474 F.2d 226, 235.

CONCLUSION

For the reasons stated, the petition for the writ of certiorari should be granted.

Respectfully submitted,

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